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No. ____

In The

Supreme Court of the United States

GEORGE POWERS, and
SUPREME HEALTH CARE SERVICES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal conviction can be maintained where it is admitted by the United States Attorney and found by the U.S. Ninth Circuit that the United States could not, and did not, prove any one of the 20 count indictment beyond a reasonable doubt within the meaning of *In Re Winship*, 397 U.S. 358, 364 (1970)?

2. Whether the standard adopted by the United States Court of Appeals for the Ninth Circuit to affirm 15 counts and reverse 5 counts in the 20 count indictment satisfied the command of *In Re Winship*, 397 U.S. 358, 364 (1970)?

3. Whether a conflict exists in the United States Courts of Appeals on the above issue under *In Re Winship*, 397 U.S. 358, 364 (1970) requiring the grant of Certiorari to resolve the conflict? (Compare *United States v. Vardel*, 760 F. 2d 189, 190-91 (8th Cir. 1985) with *United States v. Hewes*, 729 F. 2d 1302, 1322 (11th Cir. 1984))

4. Whether, under the Fifth Amendment, petitioners could have been held to answer for any crime other than the specific counts 1-20 of Appendix A since no indictment was returned except for those specific crimes?

5. Whether, under the Sixth Amendment, petitioners were informed of any crimes in the accusation other than the 20 specific counts, and gave up their right to testify personally and to call any other witnesses for their defense, since the government introduced into evidence documents establishing that each of the counts was not proven, and the U.S. Attorney so conceded?

QUESTIONS PRESENTED – Continued

6. Whether a United States District Court can adopt a figure of $385,332.09 and order restitution thereof in a sentence imposed, and where a claimed "intended loss" of greater than $1,500,000 caused a 12 level enhancement in the United States Sentencing Guidelines, causing a 27 month elevation beyond the 6 months otherwise provided for, 2F1.1(a) U.S.S.G., where this figure was not indicted upon and was not submitted to the jury, within the commands of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)?

7. Whether the U.S. Ninth Circuit can refuse to rule, in direct appeal, on the above challenge under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) inasmuch as petitioner Powers is now incarcerated, and is being forced to serve a federal sentence in excess of 6 months?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

George Powers and Supreme Health Care, Inc., petitioners, seek a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the memorandum filed July 31, 2002, rehearing and suggestion for rehearing en banc denied October 3, 2002.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit filed its unpublished *Memorandum* on July 31, 2002. This appears as Appendix C to this petition.

On October 3, 2002, the U.S. Ninth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc. A copy of that order appears as Appendix D to this petition.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction by an unpublished *Memorandum* filed July 31, 2002. A copy of that *Memorandum* appears at Appendix C.

(ii) The U.S. Ninth Circuit denied a petition for Rehearing/Suggestion for Rehearing En Banc on October 3, 2002. A copy of that Order appears at Appendix D.

(iii) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defence.

UNITED STATES SENTENCING GUIDELINES 2F1.1(a), 2F1.1(b)(1)(M)

§2F1.1 **Fraud and Deceit**

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(M) More than $1,500,000	add 12

STATEMENT OF THE CASE

Petitioners George Powers and Supreme Health Care, Inc., licensed providers of hospital supplies to hospitals and nursing homes under the Medicare program, were indicted for 20 specific counts of falsely claiming amounts of $453.90 per count for items supplied while failing to provide said items to the hospital. Appendix A to this petition sets forth that Indictment.

The government introduced into evidence a document that established actual delivery for each count, of which Appendix B is a representative, here dealing with Count 1 of the Indictment.

Appendix B contains for Count 1 a Certificate of Medical Necessity signed by the physician, and the required amounts of saline and syringes to support that named patient, and a receipt executed by the hospital that all of the supplies were delivered to the medical facility. This example appertained for each of the 20 separate counts.

This package then allowed petitioners to electronically transmit a claim from their California headquarters to the CIGNA Insurance Company in Tennessee, who ultimately arranged payment.

The government asserted in its Indictment, Appendix A, that in each of the named counts petitioners defrauded the Medicare program, yet could not prove any one of the counts at trial, and in her closing summary/argument to the jury, the AUSA admitted this failure; instead she urged conviction because statistics gathered by the government were claimed to support that petitioners had, over some year to year and a half previous to the truncated period covered by the 20 counts, failed to purchase enough supplies to account for quantities that they had electronically billed for; yet the government could not, and did not prove beyond a reasonable doubt that each element of each count had been established.

Petitioners were convicted of all 20 counts, involving a total alleged fraud of $9,078.

The U.S. probation office asserted that petitioners had "intended" to bilk the Medicare program of "over $1,500,000," and they recommended that petitioners make "restitution of $385,332.09." Neither of these amounts were submitted to the jury, and no findings were made that these losses either were "intended" or had ever occurred.

The appeal to the U.S. Ninth Circuit resulted during oral argument in troubling to the government colloquy by the panel over the failure to prove any count, and several additional briefings post-argument were requested.

In a non-published memorandum, that 3 judge panel reversed 5 of the 20 counts, and affirmed 15 counts, basing the "reasoning" on a "standard" that excused the beyond reasonable doubt command of *In Re Winship*, 397 U.S. 358, 364 (1970).

On an attack that the sentence of 33 months exceeded the 6 months basic sentence of the U.S.S.G. 2F1.1(a), the panel eschewed determination whatsoever, deferring in footnote 3 of Appendix C to a remand for "resentencing" on the 15 affirmed counts.

Of course, due to the concurrent sentences on all counts, and due to the once adopted "intent to defraud" of over $1,500,000, there is no likelihood of a different sentence, and therefore petitioners were denied timely resolution of their claims under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

A sought rehearing/rehearing EN BANC was denied on October 3, 2002 (Appendix D).

Certiorari is sought to the U.S. Court of Appeals for the Ninth Circuit to review this highly unusual, unorthodox abdication of the commands of *In Re Winship*, 397 U.S. 358, 364 (1970) (Argument I) and the refusal to resolve the very ripe, non-changeable issue under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Argument III).

As is shown in Argument II infra, a major conflict exists in the U.S. Circuit Courts for the Eighth and Eleventh Circuits on this issue, which should require the grant of Certiorari; compare *United States v. Vardell*, 760 F. 2d 189, 190-91 (8th Cir. 1985) with *United States v. Hewes*, 729 F. 2d 1302, 1322 (11th Cir. 1984).

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. To affirm that a Federal Indictment must establish the exact crimes for which the defendant is to

be tried, and if said specific exact crimes are not proven beyond a reasonable doubt, some of the convicted counts cannot be affirmed by a Court of Appeal asserting that "it is fair to say" that the count, while not provable by itself, as required by *In Re Winship*, 397 U.S. 358, 364 (1970) "furthered the scheme to defraud," and "If the government could have segregated the (medical supply) delivery" then "perhaps it would be appropriate to require the government to show that individual bills relating to individual patents were false"; the government totally controlled the indictment, and could have, but did not, indict on a separate, overall conspiracy, or "scheme to defraud" covering and encompassing times earlier than the 20 count period from December 23, 1994, to and including February 2, 1995.

2. To reaffirm that *In Re Winship*, 397 U.S. 358, 364 (1970) must be specifically applied to each element of each individual count, and a concession of failure of proof of each element of each of the 20 counts must result in reversal of the conviction of that Count.

3. As set forth in Argument II infra, a major conflict in the U.S. Circuit Courts now exists in published decisions which should require the grant of Certiorari. Compare *United States v. Vardell*, 760 F. 2d 189, 190-91 (8th Cir. 1985) with *United States v. Hewes*, 729 F. 2d 1302, 1322 (11th Cir. 1984).

4. To affirm that on indictment charging a specific total fraud of $9,078.00, which was the only figures submitted to the jury and which the jury ruled on, cannot permit a federal sentence to be imposed at an arbitrary "restitution" of $385,332.09 and an "intended loss" of greater than $1,500,000 causing a U.S.S.G. elevation of

12 points and an increase of 27 months custody, where the otherwise indicated custodial maximum was 6 months, in view of *Apprendi v. New Jersey*, 530 U.S. 446 (2000).

5. To affirm that a federal circuit court cannot refuse to apply, in the direct appeal, the rule of *Apprendi v. New Jersey*, 530 U.S. 446 (2000) since failure to reach the issue has required petitioner Powers to serve well in excess of the 6 months indicated by the U.S.S.G., 2F1.1(a).

ARGUMENT I

PURSUANT TO INDICTMENT, APPENDIX A, PETITIONERS WERE INDICTED FOR 20 SPECIFIC DISCRETE ACTS OF VIOLATION OF 18 U.S.C. 1343, WIRE FRAUD, EACH CONSISTING OF $453.90 FRAUDULENT CLAIMS FOR MEDICAL SUPPLIES DELIVERED TO SOUTHERN CALIFORNIA HOSPITALS. THE UNITED STATES ATTORNEY AT TRIAL CONCEDED THAT THE GOVERNMENT COULD NOT PROVE ANY ONE OF THEM, A CONCESSION THAT REQUIRES, PER *IN RE WINSHIP*, 397 U.S. 358, 364 (1970), THAT THE CONVICTION OF EACH BE REVERSED. THE U.S. NINTH CIRCUIT REVERSED 5 OF 20, AFFIRMING 15 OF 20 COUNTS, USING STANDARDS THAT FAILED TO MEET THE MANDATE OF *WINSHIP*. CERTIORARI SHOULD BE GRANTED TO REAFFIRM THAT *WINSHIP* IS THE MANDATED STANDARD AND NO FEDERAL APPELLATE COURT CAN SUBSTITUTE ITS OWN LESSER STANDARD TO EXCUSE INADEQUATE AND INCOMPETENT INDICTMENTS.

Petitioners Powers and Supreme Health Care, Inc., were indicted for 20 specific counts, each asserting a false claim for reimbursement for medical supplies not in fact delivered on those exact dates to certain hospital facilities; the U.S. Attorney conceded to the jury that the Government could not prove any one of them, but encouraged the jury to look to asserted evidence totally outside the charging period to claim that somewhere in this period the petitioners had never purchased from suppliers sufficient medical supplies to cover alleged deliveries throughout the

previous many, many months of the operation of Supreme Health Care, Inc., as a supplier of these commodities to hospitals in Southern California, and hence must be guilty of each count.

The U.S. Attorney in final summation to the jury stated:

> "Now, 20 claims are charged in the indictment . . . and what you'll see is that any one of these claims could be construed as furthering the scheme to defraud.
>
> Now, has the government been able to pinpoint exactly which specific claims are false? The answer is no. Clearly as of February 1994, the defendants do not have enough product on hand to completely fill any delivery receipt.
>
> Now, whether they held back product and . . . chose to completely deliver three cases to one nursing home, the government can't say. But when you look at the scope of the fraud, you know that they didn't have enough product to supply any nursing home with everything – after the spring of 1994 with everything set forth on the delivery receipts, and you know from the four homes that are at issue in the charged counts, that those homes did not receive the products as claimed on the delivery receipts.
>
> In summary, ladies and gentleman, the government submits that the evidence in this case shows beyond any reasonable doubt that the defendants engaged in a scheme to bill the Medicare program for saline and syringes that were not provided as claimed and that the shortfall from their fraudulent scheme was approximately $1.6 million.

> Based on all the evidence in this case, the government asks you to return a verdict of guilty on all counts as charged. Thank you."

The U.S. Ninth Circuit also essentially concedes that any individual count of the 20 Counts could not be proven, and was not proven, but that the government should be excused, and be saved from its inadequate, incompetent indictment, on standards of proof falling below the mandates of *In Re Winship*, 397 U.S. 358, 364 (1970).

Of course, *Winship* demands that each element for each specific crime be proven true beyond a reasonable doubt. This means, for each separate count dealing with the allegedly false wire transmission claim, that as to that date and claim, taken in isolation, the government must prove:

(a) a scheme to defraud was then being done, i.e. that that specific monetary transmission was that day false;

(b) interstate wires were then, on that date, carrying known false billings; and

(c) on that date there existed a specific intent to defraud.

The U.S. Ninth Circuit at C-3 of its *Memorandum*, asserts that:

"The problem identified at oral argument is that the evidence did not establish that the quantities of product indicated in the individual items were not delivered," i.e., there was no proof that the particular individual claim then being sent by wire was fraudulent.

The Court then moved away from each specific charged count and redefined the task on appeal to be resolved as:

"We therefore must decide whether the invoices enumerated as counts were in furtherance of the fraud." (Appendix C-3)

The problem was, and is, that there was no separate all-encompassing single count that ensnared an extensive period of time pleading a "conspiracy" or a "scheme to defraud"; all that exists in Appendix A are the 20 separate, singular individual counts, entitled "The Grand Jury charges: counts one through twenty (18 U.S.C. 1343)" and it is conceded that any one of these counts could not be proven. Indeed, and in fact, the government introduced as to each count Appendix B, which is representative of each count, here being Count 1 of the Indictment. This evidence showed that the materials were supported by a Certificate of Medical Necessity executed by a physician, the supplies were delivered, and were accepted by the hospital in question. This permitted the electronic billing, and, as stated, the government counsel and the U.S. Ninth Circuit concede that none of the 20 Counts could be proven beyond a reasonable doubt.

That Court then excused the mandate of *In Re Winship*, 397 U.S. 358, 364 (1970), requiring proof beyond a reasonable doubt of each element of each Count by using a "fair to say" standard that each claim, even if truly accurate, "furthered a scheme to defraud," and only if the "government could have segregated the delivery by individual patient and invoice, THEN PERHAPS IT WOULD BE APPROPRIATE TO REQUIRE THE GOVERNMENT

TO SHOW THAT INDIVIDUAL BILLS RELATING TO INDIVIDUAL PATIENTS WERE FALSE."

An honest reading and an honest acknowledgement of the *Winship* mandate leaves no room for "perhaps," or "appropriate to require" but, indeed, the government is required to prove all elements of all charged counts separately beyond a reasonable doubt.

This, admittedly, the government failed to do. It seems clear that a proper indictment could have provided the government the vehicle to try the case as the Ninth Circuit now belatedly suggests, i.e., a single count of conspiracy, or fraud, or like structure, but it did not. Under the Fifth and Sixth Amendments the convictions of the 15 counts affirmed must be set aside.

Indeed, defense counsel at trial should have been able to decide whether to have petitioner Powers testify, or whether to call any other witness, or conduct scope of cross-examination and confrontation of prosecution witnesses, solely on the indictment presented, and its 20 specific counts. (U.S. Constitution, Sixth Amendment)

To now excuse this government indictment, and augment a standard to save these convictions that fails to comply with the mandate of *In Re Winship*, 397 U.S. 358, 364 (1960), presents a unique issue requiring the Grant of Certiorari to the U.S. Court of Appeals for the Ninth Circuit.

ARGUMENT II

A CONFLICT EXISTS IN THE UNITED STATES COURTS OF APPEALS WHICH SHOULD REQUIRE THE GRANT OF CERTIORARI TO RESOLVE THAT CONFLICT AND ESTABLISH NATIONAL LAW.

A key conflict exists between the U.S. Eighth and Eleventh Circuits on the important issue under *In Re Winship*, 397 U.S. 358, 364 (1970) which is now presented. Compare *United States v. Vardell*, 760 F. 2d 189, 190-91 (8th Cir. 1985) (upholding convictions where, although the government did not prove that specific invoices charged in the indictment were false, the defendant sent invoices which in their entirety were in fact false) with *United States v. Hewes*, 729 F. 2d 1302, 1322 (11th Cir. 1984) (overturning convictions where the government failed to prove that individual purchase orders were fraudulent even though other communications between the parties were fraudulent and, therefore, part of a fraudulent scheme). This conflict should require the Granting of Certiorari to resolve the conflict.

It is here contended that the commands of *In Re Winship*, 397 U.S. 358, 364 (1970) require adaptation of the position of the U.S. 11th Circuit as the national authority on this subject.

Where a tremendous number of claims are made daily under these ubiquitous, pervasive government programs, there is a compelling need for this Honorable Court to speak decisively on this issue. Certiorari should, therefore, be granted.

ARGUMENT III

THE INDICTMENT IN THIS CASE ASSERTED THAT $493.90 X 20 = $9,078 HAD BEEN ILLEGALLY CLAIMED VIA WIRE FRAUD UNDER 18 U.S.C. 1343 BY PETITIONERS. NO OTHER AMOUNTS WERE SUBMITTED TO THE JURY NOR DID THE JURY FIND ANY ADDITIONAL SUMS. A SANCTION IMPOSED AT SENTENCING THAT REQUIRED PETITIONERS TO MAKE "RESTITUTION OF $385,332.19" AND CAUSED A 12-POINT ELEVATION IN THE U.S.S.G. VIOLATED THE COMMAND OF *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000). THE U.S. 9TH CIRCUIT ERRED IN REFUSING RESOLUTION OF THIS ISSUE SINCE PETITIONER POWERS IS NOW SERVING THIS ENHANCED SENTENCE, ABOVE THE 6-MONTH MAXIMUM SPECIFIED IN THE U.S.S.G. 2F1.1(A) HAD THIS ELEVATION NOT BEEN IMPOSED.

The Base offense level for an 18 U.S.C. 1343 offense is set forth in Section 2F1.1 of the 1998 U.S.S.G. Pursuant to Section 2F1.1(a) the base offense level is 6, resulting, for a Column I offense, in a sanction of 0-6 months. The U.S. probation office asserted that an "intended loss" was some $1,658,968, an amount greater than $1,500,000 but less than $2,500,000, warranting a 12 level U.S.S.G. increase. A "repeated acts" elevation of 2 points resulted, therefore, in a 6+12+2=20 level, for a range of 33-41 months.

The Court imposed 33 months on each count to be served concurrently.

It is here critical to note that no "intended loss" nor figure of restitution was submitted to the jury nor found to be true. If the actual range was 6+2=8, the sentence range remained at 0-6 months, and, therefore, the effect of the "intended loss" of more than $1,500,000 caused a sentence elevation of at least 27 months. Such an elevated sentence beyond 6 months offends the mandate of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and cannot stand, nor can the sanction of "restitution" of $385,332.09 be upheld since this amount was not submitted to the jury. See also *United States v. Nordby*, 225 F. 3d 1053 (9th Cir. 2000), at 1057-1059, holding that amounts of money/theft and consequential sentence elevations for which a defendant is sentenced are facts that must be submitted to the jury and proven beyond a reasonable doubt.

The Ninth Circuit eschewed resolution of this sentencing issue, remanding to the District Court for resentencing in view of reversal of 5 of the 20 counts; however, petitioner Powers is now serving time, and has served time, in excess of 6 months, and he should be entitled to immediate resolution on this appeal of the *Apprendi* issue.

Certiorari should be therefore granted to resolve this issue under *Apprendi* where the amounts in issue that have caused this excessive elevation and restitution were not submitted to the jury, and were not found true beyond a reasonable doubt.

The issue, additionally, is whether a U.S. Circuit Court can refuse to resolve the issue, per footnote 3 of Appendix C, where to refuse allows the government to carry out the excess sanction. Certiorari should therefore be granted.

CONCLUSION

Certiorari should be granted to the United States Court of Appeals for the Ninth Circuit to resolve the dual major issues of this petition:

(1) Whether a conviction of 15 of the 20 indicted counts can be sustained where, admittedly, the United States could not and did not prove any one of the 20 counts beyond a reasonable doubt per *In Re Winship*, 397 U.S. 358, 364 (1970) and

(2) Whether a sentence increase of 27 months above the 6 months indicated sentence can be imposed on a criminal defendant because of a non-indicted, non-submitted to the jury, arbitrary restitution order of $385,332.09 and a claimed "intent to defraud" of more than $1,500,000 causing a 12 level elevation under the U.S.S.G. in view of the commands of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

A conflict existing between two major U.S. Circuits should require the Grant of Certiorari; compare *United States v. Vardell*, 760 F. 2d 189, 190-91 (8th Cir. 1985) with *United States v. Hewes*, 729 F. 2d 1302, 1322 (11th Cir. 1984).

Dated: December 30, 2002

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 1999 Grand Jury

UNITED STATES OF AMERICA,	) CR 99-565(A)-TJH
Plaintiff,	) FIRST SUPERSEDING INDICTMENT
v.	) [18 U.S.C. § 1343; Wire Fraud]
GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC.,	)
Defendants.	)

The Grand Jury charges:

COUNTS ONE THROUGH TWENTY

[18 U.S.C. § 1343]

A. GENERAL ALLEGATIONS

The Medicare Program

1. Medicare is a public health-insurance program administered by the United States Department of Health and Human Services (hereinafter "HHS"). The Medicare program is a federally funded insurance program that provides medical insurance benefits for individuals aged sixty-five or older and for certain individuals who are disabled. A person who receives Medicare insurance benefits is referred to as a Medicare "beneficiary."

2. The Medicare program pays for medical equipment and supplies for beneficiaries eligible to receive such equipment or supplies.

3. In order to bill Medicare for the sale of medical equipment and/or supplies, a provider must obtain a Certificate of Medical Necessity (hereinafter "CMN") signed by a licensed physician which certifies that the medical equipment and/or supplies are medically necessary for the health of the beneficiary.

4. Medicare claims are processed by private insurance companies under contract with HHS. Since approximately January 1994, claims seeking reimbursement for medical equipment and supplies provided by companies in California to Medicare beneficiaries have been processed and paid by Connecticut General Life Insurance Company, a division of CIGNA (hereinafter "CIGNA"), located in Nashville, Tennessee. Providers bill Medicare for medical equipment and supplies by submitting claims either electronically or by mail and CIGNA thereafter sends payments to the providers by mail.

Defendants

1. At all times relevant herein, SUPREME HEALTH CARE SERVICES, INC. was a retail medical equipment supply company located in Chatsworth, California.

2. GEORGE POWERS was President of SUPREME HEALTH CARE SERVICES, INC.

3. On January 1, 1994, CIGNA authorized SUPREME HEALTH CARE SERVICES, INC. to submit claims electronically.

B. THE FRAUDULENT SCHEME

1. Beginning in late 1993 and continuing to in or about February 1995, in Los Angeles County, within the Central District of California, defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC. devised and executed a scheme to defraud HHS and the Medicare program and to obtain money and property by means of false and fraudulent pretenses, representations, and promises.

2. As part of the scheme, defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC. offered to provide nursing homes with "free" saline solution (hereinafter "saline") and irrigations syringes (hereinafter "syringes") to clean the perineal area of incontinent Medicare beneficiaries. Defendants then submitted claims to Medicare seeking reimbursements for the saline and syringes regardless of whether the beneficiary's physician had prescribed the saline and syringes or whether the saline and syringes had actually been supplied.

C. EXECUTION OF THE SCHEME TO DEFRAUD

1. Defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC. would hire sales representatives to contact nursing homes and offer to provide saline and syringes to be used in the care of incontinent Medicare beneficiaries. The sales representatives would inform the nursing homes that the saline and syringes were paid by the Medicare program and therefore would be provided at no cost to the nursing home.

2. If a nursing home accepted the sales representative's proposal, defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC. would direct the preparation of a CMN reflecting that three syringes and one bottle of saline would be supplied to the beneficiary daily. The CMN would be sent to the Medicare beneficiary's physician so that the physician could prescribe the saline and syringes.

3. Defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC. would fail to purchase sufficient saline and syringes to fill the amounts purportedly provided to the Medicare beneficiaries according to the claims submitted to CIGNA.

4. Defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC. would then submit claims to CIGNA, representing that the saline and syringes had been provided in compliance with Medicare regulations, when, in fact, as defendants well knew, either (a) the saline and syringes had not been prescribed by the beneficiary's physician at the time the supplies were billed to Medicare, or (b) the saline and syringes had not been provided to the beneficiary as claimed.

D. RESULTS OF THE SCHEME

As a result of the scheme to defraud described above, defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC. billed Medicare for approximately $1.4 million for saline and irrigation syringes that were either not prescribed by a physician at the time of billing or never provided to Medicare beneficiaries.

E. USE OF THE WIRES TO EXECUTE THE SCHEME TO DEFRAUD

On or about the following dates, in Los Angeles County, within the Central District of California, defendants GEORGE POWERS and SUPREME HEALTH CARE SERVICES, INC., for the purpose of executing the scheme to defraud described above, caused to be transmitted by means of wire communications, in interstate commerce, from the offices of SUPREME HEALTH CARE SERVICES, INC. in Chatsworth, California to CIGNA in Nashville, Tennessee, the following claims seeking reimbursement for saline and syringes purportedly provided to Medicare beneficiaries:

COUNT	DATE	CLAIM NUMBER	AMOUNT BILLED
ONE	12/23/94	94357808493000	$453.90
TWO	12/23/94	94357808510000	$453.90
THREE	12/23/94	94357808540000	$453.90
FOUR	12/23/94	94357808574000	$453.90
FIVE	12/23/94	94357808603000	$453.90
SIX	1/17/95	95017804461000	$453.90
SEVEN	1/17/95	95017804462000	$453.90
EIGHT	1/17/95	95017804472000	$453.90
NINE	1/17/95	95017804573000	$453.90
TEN	1/17/95	95017804574000	$453.90
ELEVEN	1/17/95	95017804561000	$453.90
TWELVE	1/17/95	95017804565000	$453.90
THIRTEEN	1/17/95	95017804570000	$453.90
FOURTEEN	1/17/95	95017804572000	$453.90

FIFTEEN	1/17/95	95017804635000	$453.90
SIXTEEN	2/02/95	95033806471000	$453.90
SEVENTEEN	2/02/95	95033806490000	$453.90
EIGHTEEN	2/02/95	95033806504000	$453.90
NINETEEN	2/02/95	95033806506000	$453.90
TWENTY	2/02/95	95033806532000	$453.90

A TRUE BILL

_____

Foreperson

ALEJANDRO N. MAYORKAS
United States Attorney

GEORGE S. CARDONA
Assistant United States Attorney
Chief, Criminal Division

KIMBERLY A. DUNNE
Assistant United States Attorney
Chief, Public Corruption and
Government Fraud Section

RECORD OF ADMISSION

IL:	FACILITY NAME				ADMISSION DATE
323	VERDUGO VISTA CONV HOSPITAL				04 /28 /94
IENT'S LAST NAME	FIRST NAME	M.I.	MED. REC. NO.		REVISED DATE
BEAMAN	ALICE	M	1753		/ /
IENT'S ADDRESS — STREET. CITY. STATE. ZIP					
1746 LA BARRANCA, LA CANADA, CA 91011					

TH DATE	AGE	BIRTH PLACE	SEX	RACE	CITIZENSHIP	RELIGION	MARITAL STATUS
4/ 19/01	93	CANADA	F	C	USA	PROTESTANT	M S D W X S

ENDING PHYSICIAN(s)	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
R. LELAND WATKINS	818 790-1145	1530 FOOTHILL BLVD	LA CANADA	CA	910
ERNATE PHYSICIAN	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
CALL EXCHANGE	818 / 790-1145				
ARMACY	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
CONVACARE PHARMACY	310 / 926-6660	13100 ALONDRA BLVD #101	CERRITOS CA		9070
DIATRIST	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
GERICARE PODIATRY	714 / 599-0981	425 W BONITA AVE #110	SAN DIMAS	CA	9120
TENDING DENTIST	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
CONV DENTAL CARE	818 / 891-3313	8251 SEPULVEDA BLVD	PANORAMA	CA	9177
ORTUARY	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
RA VIEW GARDENS	/				

OTIFY FOR EMERGENCY	RELATION	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
AROLYN SHERBURNE	FRD	/ 790-5653	4332 SHEPHERD LANE	LA CANADA	CA	9101
T. EMER. NOTIFICATION	RELATION	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
IRGINIA EDEN	FRD	818 / 790-3943	1728 LA BARRANCA	LA CANADA	CA	910
T. EMER. NOTIFICATION	RELATION	TELEPHONE NO.	ADDRESS	CITY	STATE	ZIP
O T SHERBURNE	FRD	818/ 242-7879				

OMI. . DIAGNOSIS

DEBILITATION SECON TO SEVERE DEPENDENT EDEMA OF BOTH LEGS, STASIS DERMATITIS AI

CELLULITIS OF BOTH LEGS, CHF COMPENSATED, ANEMIA, SQUANOUS CELL CARCINOMA OF RI

LERGIES CHEEK

NKA

OMITTED FROM — STREET. CITY. STATE. ZIP	TELEPHONE NO.	DATE OF QUALIFYING STAY (Medicare) Admitted	Discharged
VERDUGO HILLS HOSPITAL (TCU)	/	04 18 94	04 28 / 9
RIOR HOSPITAL SNF INFO. — STREET. CITY. STATE. ZIP	TELEPHONE NO.		
ERDUGO HILL (ACUTE)	/	04 13 94	04 18 / 9
	TELEPHONE NO.		
	/	/	/ /

BILLING DATA

ESPONSIBLE PARTY NAME	PATIENT ACCTNG. NO.	INITIAL PATIENT STATUS	SECONDARY PATIENT STATUS	MEDICARE NO.
CAROLYN SHERBURNE	1753	MEDICARE	PRIVATE	021-05-8937-A
ODRESS — STREET. CITY. STATE. ZIP	RATE (PRIVATE OR LIABILITY)	EST.LIA.	MET AT FORMER FACILITY	MEDI-CAL NO.
4332 SHEPHERDS LANE, LA	CANADA, CA 91011		☐ YES ☐ NO	
OME PHONE	WORK PHONE	SOCIAL SECURITY NO.	LAUNDRY DONE BY FACILITY	
18/790-5653	/	021 - 05 - 8937	☒ YES ☐ NO	

MF R & ADDRESS OF RESPONSIBLE PARTY — STREET. CITY. STATE. ZIP

COUNT ONE

Admission Agreement, Patient Rights, Consent for Treatment in Business Office

W/ 5883 (6/93) SNF FORMS (714) 539-1600

BEST AVAILABLE COPY

Effective 10/93 DURABLE MEDICAL EQUIPMENT REGI(.L CARRIER DMERC 05.(

CERTIFICATE OF MEDICAL NECESSITY: SURGICAL DRESSINGS / UROLOGICAL SUPPLIES

SECTION A CERTIFICATION: ☐ INITIAL

PATIENT NAME, ADDRESS, TELEPHONE AND HIC NO.
ALICE BEAMAN
3050 Montrose Avenue
Montrose, CA 91214
(818) 957-0850 HICN 021-05-8937-A

SUPPLIER NAME, ADDRESS, TELEPHONE, AND NSC NUMBER
SUPREME HEALTHCARE
9720 Cozycroft Ave.
Chatsworth, CA 91311
(818) 718-2967 NSC 0284640001

PLACE OF SERVICE 31 REPLACEMENT ITEM ___

NAME AND ADDRESS OF FACILITY IF APPLICABLE (SEE BACK OF FORM):
VERDUGO VISTA CONVALESCENT HOSPITAL
3050 Montrose Avenue
Montrose, CA 91214

HCPCS CODE(S)

SECTION B **CLINICAL INFORMATION**

DIAGNOSIS (ICD9): 4280 2859 7843

DOB 4/19/1901

I LAST EXAMINED THIS PATIENT FOR THIS CONDITION ON: 8/10/94 PT. SEX F (M OR F)

DATE NEEDED INITIAL 8/10/94 REVISED ___/___/___
EST. LENGTH OF NEED: # OF MONTHS: 12 (99 = LIFETIM

ANSWER QUESTIONS 1-3 AND 5-7 FOR SURGICAL DRESSINGS, AND 4-7 FOR UROLOGICAL SUPPLIES
Use Y - Yes, N - No or D for Does Not Apply unless otherwise noted.

SURGICAL DRESSINGS

[ ] 1. Does the patient have a surgical wound?

___ 2. Number of surgical wounds (enter number).

3. Date of surgical procedure: (MM/DD/YY) ___/___/___

UROLOGICAL SUPPLIES

[Y] 4. Does the patient have permanent urinary incontinence?

5. Dressings/Urological Supplies Ordered	6. HCPCS Code	7. Frequency of Change
Irrigation Syringe	A4322	3 x per day
Saline solution	A4323	1 x per day

I certify the medical necessity of these items for this patient. Section B of this form and any statement on my letterhead attached hereto has be completed by me or reviewed by me. The foregoing information is true, accurate, and complete, and I understand that any falsification, omissic or concealment of material fact may subject me to civil or criminal liability.

PHYSICIAN NAME, ADDRESS
Dr. L. Watkins
1530 Foothill Blvd
La Canada, CA 91011

Leland C. Watkins M.D. 8/15/94
PHYSICIAN'S SIGNATURE: (A STAMPED SIGNATURE IS NOT ACCEPTABLE) DATE

☒ Attending ☐ Consulting ☐ Other ordering

UPIN: A44612

TELEPHONE #: (818) 790-1145

SECTION A: (To be completed by the supplier)

B-2

SUPREME HEALTHCARE
8720 Cozycroft Ave.
Chatsworth, CA 91311
(818) 718-2967

15058

CUSTOMER'S ORDER NO.	DEPARTMENT	DATE 12/7/94

NAME VERDUGO VISTA CONV. HOSPITAL

ADDRESS 3050 MONTROSE AVE.

CITY, STATE, ZIP LA CRESCENTA 91214

SOLD BY	CASH	C.O.D.	CHARGE	ON ACCT.	MDSE RETD	PAID OUT
JOHN						

	QUAN.	DESCRIPTION	PRICE	AMOUNT
1	111 CS.	IRRIGATION SYRINGES (50/CS)	5550 PCS - MEDLINE	
2	30 PCS.			
3	155 CS.	SALINE SOLUTION (1000ML)	1860 PCS. - BAXTER	
4				
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				

RECEIVED BY

KEEP THIS SLIP FOR REFERENCE

TC 5805

BILLED MAY 1 1 1995

3

B-3

VERDUGO VISTA CONVALESCENT HOSPITAL
3050 Montrose Avenue
La Crescenta, CA 91214

1. Vito Ventura
2. Charles McKinnon
3. Francis Maxey
4. Lela Wolf
5. Mary Ahrens
6. Keng Khoo
7. Edna Dorroh
8. Ruby Garrett
9. Alice Beaman
10. Fred Chatard
11. Emma Rihn
12. Betty Boyer
13. Frances Dixon
14. Maria Mironowski
15. Lucille Hohman
16. Bertha Furrey
17. Ivy McDonnel
18. Dorothy Mason
19. JeanetteCopeland
20. Alma westall
21. Helen Kosik
22. Norma spengler
23. Alma Linn
24. Norma Enloe
25. Clara Taren
26. Michael Stigliani
27. Virginia Doane
28. Angelina Staff
29. Jessie Hultman
30. Irene Highfill
31. Stella Hall
32. Hallene Castle
33. Kenneth Nelson
34. Olive Stewart
35. Irene Desby
36. Helen Davis
37. Violet Akers
38. Urban Wilde
39. Dolores Gilliland
40. Monzelle dunks
41. Santa Rende
42. Dante Bettini
43. Isolde Dalton
44. Margaret Stoever
45. Josephine Vega
46. Bertha Farson
47. Mabel Roth
48. Jane McLarty
49. Fred Miller
50. Thelma Kistner
51. Dolores Myers
52. Delia Savage
53. Ruth Siko
54. Joyce Lesieur
55. Ann Wood
56. Mildred Johnson
57. Karlene Crutchfield
58. Gretchen Geisel
59. Ida Branhan
60. Kilhatir Dilberain
61. Edo Eden
62. Dewitt White

FOR DR # 15058

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B-4

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CONTRACT : DMERC                                   CIGNA, INC.                                          REPORT:
    \    : DMERC                                   MEDICARE PART B                                      PAGE 1221
                                                ADJUDICATION R/    ING SYSTEM
I. JRT   : 024                                  BILLER CLAIM EX    ION REPORT
          ,STATUS=      OPERATOR:  000          HMO DATA 1 CODE      OPTION   EFFC DATE        TERM DATE
                                                HMO DATA 2 CODE      OPTION   EFFC DATE        TERM DATE        LOCK ON
C: 94357 8084 93 000  NK: BEAMA  AK: 30M  SEX: F  HI:  021058937A     TOT:   453.90   BPD:    0.00  BILLER:  D08600786   RID: 220

CT: A      OL:          AP:                F:        R:        WD:        RPY:

REF: A44612        DIAG: 4280  2859  7883          MG:                                        FS:

LN     PROCEDURE   PPT        SUBMTD   FROM     TO      NOS  D  PHYS/SUPLR      ALLOWD    AC    F    R    ADS    LCHG     SP
01     A4322       31         257.40   120794   1207    090  1  0284640001
02     A4323       31         196.50   120794   1207    030  1  0284640001
03
04
05
06
07
08
09
10
11
12
13
R/S:   ST:        ADS:          DEV: N     ADIN:       MRN:  0000000     MD:             DD:             RMKS:
PA     0.00     PPD      0.00      DR: 94357   ADJ:          DED:             BL:       PSY:
FNM: ALICE          MI:        LNM: BEAMAN            CR:                TIP:                  HA:    PATIENT NBR: 021058937A
A1: 3050 MONTROSE AVE                    A2:                                          A3:
CITY: MONTROSE          ST: CA   ZIP: 91214     ORG:            PRO:
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APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GEORGE POWERS, Defendant-Appellant.	No. 01-50026 D.C. No. CR-99-565-TJH-01 MEMORANDUM[1]

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SUPREME HEALTH CARE SERVICES, INC., Defendant-Appellant.	No. 01-50028 D.C. No. CR-99-565-TJH-02 MEMORANDUM

(Filed July 31, 2002)

Appeals from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding
Argued and Submitted April 3, 2002
Pasadena, California

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Before: HAWKINS and FISHER, Circuit Judges, and WEINER, District Judge.[2]

George Powers appeals his conviction, sentence and order of restitution following a guilty verdict on charges of wire fraud in violation of 18 U.S.C. § 1343. Supreme Health Care Services, Inc. appeals its conviction and the district court's order of restitution. The district court had jurisdiction pursuant to 18 U.S.C. § 3231; this court has jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1219. We affirm in part, reverse in part and remand for resentencing.

The facts are well known to the parties and will be repeated here only as is necessary to explain our decision. At oral argument, the Panel directed the Government to identify those excerpts of the record which it believed tied the trial evidence to the specific counts contained in the indictment. Later, we ordered the parties to submit supplemental briefs addressed to the issue of whether the wire fraud convictions can be upheld if the government presented insufficient evidence that the individual uses of the wires named in the indictment were themselves fraudulent, even if there was evidence to prove that the defendants' overall use of the wires to effectuate the scheme was fraudulent. Having reviewed these submissions, we conclude that the convictions on Counts 1-5, related to Medicare patients at Verdugo Vista Convalescent Hospital, cannot be sustained on the evidence presented to the jury. The evidence was sufficient to establish

[2] Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

the overall scheme to defraud and to support the convictions on Counts 6-20.

Wire fraud has three elements: a scheme to defraud, use of the wires in furtherance of the scheme, and specific intent to defraud. *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001). The evidence amply demonstrated an overall scheme to defraud the Medicare system by billing for saline and syringes that defendants could not possibly have delivered. Supreme's financial records showing the discrepancy between what it ordered at wholesale and what it purportedly delivered at retail, along with the testimony of Supreme's co-founder detailing how Supreme marketed saline and syringes to nursing homes by packaging them with free supplies that were otherwise non-reimbursable, were sufficient to establish the appellants knowingly devised or participated in a scheme to defraud or obtain money by means of false and fraudulent pretenses. The problem identified at oral argument is that the evidence did not establish that the quantities of product indicated in the individual invoices were not delivered. We therefore must decide whether the invoices enumerated as counts were in furtherance of the fraud.

A use of the wires or mails may be in furtherance of a scheme to defraud, even where the transmission itself is not fraudulent or false, where the use serves some purpose that advances the fraud or contributes to the success of the scheme. *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989). "To be part of the execution of the fraud, however, the use of the [wires] need not be an essential element of the scheme. . . . It is sufficient for the mailing to be 'incident to an essential part of the scheme,' . . . or 'a step in [the] plot.'" *Id.* (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). Following *Schmuck*, we have held that it

is sufficient that the use of the wires or mails be "incidental" to the fraud. *United States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000).

The government's evidence on Counts 1-5 consisted solely of the testimony of an employee of Verdugo Vista who stated only that the nursing home never received deliveries from Supreme as large as those billed. There was no attempt to connect the specific bills upon which these counts are based with any contemporaneous delivery receipt that was fraudulent. Accordingly we find there was insufficient proof presented to the jury to conclude that the use of the wire was incidental to an essential part of the scheme to defraud, and thus to sustain these counts.

As for the other counts, the government offered delivery receipts that were roughly contemporaneous with the Medicare bills, along with the testimony from nursing home employees that showed that all of the bills generated from those deliveries had to be fraudulent. For example, Supreme made a delivery to Ararat for twenty-five Medicare patients, subsequently submitting twenty-five invoices based on that delivery. Four of those invoices were charged as counts in the indictment. Where the delivery and the billing for the delivery were done as single acts and cannot be segregated by patient, it is fair to say that the entire billing, as well as each constituent invoice, furthered the scheme to defraud. If the government could have segregated the delivery by individual patient and invoice, then perhaps it would be appropriate to require the government to show that individual bills relating to individual patients were false. Here, however, where the delivery and billing were done in groups, and cannot be segregated by patient, it is fair to say that the group as a whole – and each constituent invoice – furthers the

scheme. Accordingly, we find the evidence of wire fraud was sufficient to sustain the particular invoices/counts identified in the indictment.[3]

AFFIRMED IN PART, REVERSED IN PART, REMANDED FOR RESENTENCING. All pending Motions are denied as moot.

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[3] Given our holding on Counts 1-5, we vacate the sentences and remand for resentencing. We need not reach appellants' additional arguments that the length of Powers' prison term and the amount of restitution awarded against each defendant violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GEORGE POWERS, Defendant-Appellant.	No. 01-50026 D.C. No. CR-99-00565-TJH-01 (Central California) ORDER (Filed Oct. 3, 2002)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SUPREME HEALTH CARE SERVICES, INC., Defendant-Appellant.	No. 01-50028 D.C. No. CR-99-00565-TJH-02 (Central California)

Before: HAWKINS and FISHER, Circuit Judges, and WEINER,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Hawkins and Fisher have voted to deny the petition for rehearing en banc and Judge Weiner has recommended the same.

---

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.